

**VIVRASS DEVELOPMENT LTD and Anor v FIJI NATIONAL PROVIDENT FUND BOARD and Anor**

HIGH COURT — CIVIL JURISDICTION

5 PATHIK J

20 June 2002

10 [2002] FJHC 248

**Mortgages and securities — mortgages — motion for interlocutory injunction — consent order.**

15 Vivrass Development Ltd (Plaintiff) applied for an injunction order to restrain Fiji National Provident Fund Board (Defendant) from proceeding with the mortgage sale or foreclosure of the Plaintiffs. The Defendant opposed the application on the ground that the documents for sale and purchase agreement referred to in the affidavit of the Plaintiffs are not stamped and the court cannot take any notice of it. After the consent order the Defendant had gone ahead to sell the property under the mortgage.

20 **Held** — (1) There was no ground for setting aside the consent order whether interlocutory or final. It must be given full contractual effect and could only be set aside on grounds which would justify setting aside a contract.

*Purcell v FC Trigell Ltd (t/as Southern Window and General Cleaning Co)* [1970] 3 All ER 671, considered.

25 (2) In the present case there was a contract, the terms of which were precise. It was plain that the order and the terms of the schedule embodied the negotiations between the parties and were part of the terms of the contract. The Defendant was free to proceed to mortgagees' sale in case of default of provisions of terms of settlement.

30 *Tigner-Roche & Co Ltd v Spiro and Anor* (1982) 126 Sol Jo 525, considered.

*Mr. H. Nagin* for the Plaintiffs

*Mr. G. P. Lala* for the 1st Defendant

35 **Decision**

**Pathik J.** By notice of motion inter partes dated 28 May 2002 the Plaintiffs seek:

40 An order that the 1st Defendant be restrained by itself by itself and/or through its servants and/or agents and/or howsoever from proceeding further with the mortgagee sale and/or foreclosure of the Plaintiffs' properties comprised in Certificates of Title Nos 24128 and 16219 until the 30th day of June, 2002 or until further order UPON the grounds contained in the Affidavit of Asish Kumar Narayan (f/n Jai Narayan) sworn and filed herein.

45 **Plaintiff's submission**

50 In Narayan's affidavit it is stated that Tai Momo Holdings Ltd, the prospective purchaser of CT No 24152 (Vivrass Plaza property) has been requested by Fiji Development Bank to resubmit its loan proposal for \$3.5 million dollars. The Plaintiffs have agreed to 30 June 2002 as the settlement date. Therefore the sale will not be concluded before that date. The Plaintiffs say that the funds from the sale will be sufficient to pay off the mortgage debt owing to the first Defendant.

They say that unless restrained from proceeding with mortgagee's sale the Plaintiffs will suffer irreparable loss and damage. On behalf of the Plaintiff companies, their property manager gives undertaking as to damages.

5 The learned counsel for the Plaintiffs Mr Nagin says that the balance of convenience lies in the granting of injunction. He further says that the Plaintiffs retain equity of redemption until transfer and registration. He says that there will be no prejudice to the Defendant if injunction was granted until 30 June 2002. Mr Nagin says that he is not applying to either set aside or vary the consent order made earlier on in this action but merely seeking an "injunction afresh".

#### 10 **Defendant's submission**

Mr Lala, the learned counsel for the Defendant, vigorously opposed the application. He referred the court to the written submission with authorities made by him on 1 March 2002 in an earlier application for injunction.

15 Counsel further submitted that the documents for sale and purchase agreement referred to in the affidavit of the Plaintiffs are not stamped and therefore the court cannot take any notice of it. He said that after the consent order the Defendant had gone ahead to sell the property under the mortgage. If injunction is granted it will put the Defendant to extra expense and also he is expecting settlement with a purchaser very soon.

20 Mr Lala referred the court to two cases on the effect of a consent order. They are *Purcell v FC Trigell Ltd (t/as Southern Window and General Cleaning Co)* [1970] 3 All ER 671 and *Tigner-Roche & Co Ltd v Spiro and Anor* (1982) 126 Sol Jo 525.

#### 25 **Consideration of the issue**

In considering the issue before the court one cannot ignore the history of this case. This is the third time that the Plaintiffs have come before the court applying for injunction to prevent the defendant exercising its powers of sale under the mortgage in question.

30 In the first motion the interim injunction was dissolved. A second application was made and terms of settlement was filed; the Plaintiff made default and the Defendant went ahead and confirmed the sale and purchase agreement made earlier with the successful tenderer, the Challenge Engineering Ltd, and a deposit of \$150,000 was accepted as a deposit and the settlement will be by 30 June 35 2002. The Defendant says that it does not want to lose that sale as there is not another buyer immediately available.

On the second application there was a consent order which meant that the Defendant was free to proceed to mortgagee's sale in case of default of provisions of terms of settlement. In fact the court felt that in these circumstances it was 40 *functus officio* but Mr Nagin was of the view that the court ought to entertain the application as the Plaintiffs stand to lose a lot if injunction was refused. In the interests of justice the court entertained the application.

In short it is the Plaintiffs' argument that time be given to them to enable them to obtain the loan. This application is opposed by Mr Lala.

45 In this the third application the Plaintiffs are again applying for injunction on the ground referred to hereabove. This ground in my view is no reason at all on the facts and circumstances of this case. In fact this is a very weak case compared to the one in the first application and I refer to my decision therein.

50 The nature and effect of consent order has been well expressed by Lord Denning MR in *Purcell* (above) where it was held, *inter alia*, as follows: and is pertinent to the matter before me:

*There was no ground for setting aside the consent order for a consent order, whether interlocutory or final, must be given full contractual effect and could only be set aside (Lord Denning MR differing) on grounds which would justify setting aside a contract.*

Further Buckley LJ said at 677 that a consent order must be given its full  
5 contractual effect even if it relates to an interlocutory step in the action.

In these circumstances, as indicated earlier to Mr Nagin it will be quite wrong to reopen the matter by allowing the Plaintiffs further time to find a buyer bearing in mind particularly the steps already taken by the Defendant once default was made under the consent order pursuant to the provisions of the said terms of  
10 settlement.

The present application in the light of the authorities is certainly misconceived and is an abuse of the process of the court. There is no better way of concluding this decision than by referring to the following passage from the judgment of Templeman LJ in *Tigner-Roche & Co Ltd* (above):

15 *In the present case there was a contract, the terms of which were precise. It was plain that the order and the terms of the schedule embodied the negotiations between the parties and were part of the terms of the contract. The defendants had failed substantially to comply with the undertakings they had given, and the judge had no power to alter the contract and deprive the plaintiffs of the relief which they had  
20 bargained to obtain and had obtained their contract. Reading the order as a whole, time was intended to be of the essence, and the plaintiffs would never have consented to waive their requirement and forgo the 100 per cent of the profits if the defendants were able to persuade the judge to grant an extension under RSC ord 3, r5. The defendants had not complied with the undertakings and they must accept the consequences. The judge fell into error when he decided that the present case was distinguishable from  
25 Purcell's case.*

For these reasons the motion for interlocutory injunction is dismissed with costs payable to the 1st Defendant by the Plaintiffs in the sum of \$300.

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*Motion disallowed.*

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